

Application No.: 09/916611

Docket No.: 00306-00142-USU

REMARKS

Applicant respectfully requests reconsideration in view of the amendment and following remarks. In order to expedite prosecution, the applicant has incorporated the features of objected claim 67 into claim 1.

Claims 1, 3-18, 20-28, 30-39, 41-48, 50-56, 68, 69, 71, 72, 86-91 were rejected under 35 U.S.C. 103(a) as being obvious over AF 300 from Nufarm MSDS (AF 300). The applicant respectfully traverses this rejection.

The applicant appreciates that the Examiner indicated that the subject matter of claims 57-65, 67, 70, 72-85 is allowable.

In order to expedite prosecution, the applicant has incorporated the features of allowed claim 67 into claim 1. The applicant believes that Examiner's reasons for allowance in the Office Action mailed November 30, 2004 is not completely correct because the ester is only optionally required. The applicant points out that claim 67 also covers 2,4-(dichlorophenoxy)acetic acid. It is recognized that AF 300 includes 2,4-(dichlorophenoxy)acetic acid as disclosed in the MSDS.

However, according to the MSDS, AgriCrop's AF 300 herbicide, Infosafe No. NU003 contains, *inter alia*, "solvent 400," otherwise known as kerosene. Applicant again respectfully requests reconsideration of the rejection based on U.S.C. § 103(a) for obviousness because claim 1 contains the transitional phrase, "consisting essentially of." This transitional phrase is interpreted in the case law as, "commonly used to signal a partially open claim in a patent. . . [b]y using the term 'consisting essentially of,' the drafter signals that the invention necessarily includes the listed ingredients and is open to unlisted ingredients *that do not materially affect the basic and novel properties of the invention* (emphasis added). (*PPG Industries v. Guardian*

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Industries, Corp., 156 F.3d 1351, 1354 (Fed. Cir. 1998) (rehearing *en banc* declined Nov. 25, 1998)).

According to many reports in the industry, kerosene would materially affect the basic and novel properties of the present invention.

- (1) In the "2004 Louisiana Suggested Weed Control Guide," available at <http://www.lsuagcenter.com/weedguide/pdf>, visited December 20, 2004, kerosene has a "toxicity rating" between 2-3. A toxicity rating between 2-3 means that the compound "causes burns and blisters [to] moderately irritating."
- (2) Additionally, kerosene in herbicides is dangerous to the eye, skin and respiratory systems of mammals. It can cause a potentially fatal chemical pneumonia and inflammation in fish. "Even in small amounts of diesel and kerosene in water is highly toxic to fish."¹ (3)
- (3) Furthermore, kerosene is often described as an "inert ingredient" in herbicides. An "inert ingredient" is defined as an ingredient that "enhances the action of the active ingredient" (emphasis added).²
- (4) Further evidence that kerosene causes problems is that Agricrop Affray 300 Herbicide's formulation was changed. The applicant previously submitted a copy of the February 3, 2003 Material Safety Data Sheet ("MSDS"). According to the new MSDS, Agricrop's AF 300 herbicide, has replaced the kerosene (Solvent 400) with Solvesso 150.
- (5) The use of kerosene in this large amount (Solvent 400 is 235 grams per liter) significantly affects the benefits of the inventive formulation. Also previously submitted was a declaration from Johnnie Roberts which has the MSDS as an Appendix. Contrary to

¹ http://www.powerlink.net/fen/tmwfall99_05.html visited December 20, 2004.

² <http://chppm-www.apgea.army.mil/ento/mpmh/chap6.htm> visited December 20, 2004.

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what the Examiner has asserted, the declaration established that kerosene causes problems and would materially effect the claimed invention for the following 4 reasons:

- a. Kerosene is flammable and therefore poses several problems such as with shipping and handling.
- b. Kerosene has a very noticeable and objectionable odor. Because 2,4-D esters are frequently applied in conjunction with kerosene, this would be a liability as compared with the inventive formulations which exhibit virtually no odor.
- c. Kerosene poses a potential inhalation hazard. (See AF-300 MSDS sheet under Acute – Inhaled hazards).
- d. Kerosene will likely cause deterioration of spray application equipment.

The applicant again respectfully requests that the Declaration of Johnnie Roberts must be afforded patentable weight.

Therefore, in view of any of the evidence presented above, kerosene clearly, materially, would affect the basic and novel properties of the present invention, thus, cannot fall within the scope of claim 1 of the Applicant's invention and accordingly to the applicable case law. The applicant does not believe that it is necessary to supply additional evidence to establish that kerosene in the amount disclosed by AF 300 would materially effect the claimed invention.

In view of the above amendment, applicant believes the pending application is in condition for allowance.

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Applicant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 03-2775, under Order No. 00306-00142-USU from which the undersigned is authorized to draw.

Respectfully submitted

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